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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 7, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Reply to Opposition of ASF."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: John W. Hunter
John W. Hunter

By: [signature]

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JUN 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of:	)	
	)	
DAVID A. RINGER	)	MM Docket No. 93-107
	)	
et al.,	)	File Nos. BPH-911230MA
	)	
Applications for Construction Permit for a New FM Station, Channel 280A, Westerville, Ohio	)	through
	)	BPH-911231MB

To: Administrative Law Judge
Walter C. Miller

REPLY TO OPPOSITION OF ASF

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____
John W. Hunter

By: _____
Stephen T. Yelverton
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Telephone: (202) 659-3900

June 7, 1993

B:SEARCY61.FCC

REPLY TO OPPOSITION OF ASF

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.229 (d) and 1.294 (c) of the Commission's Rules, hereby submits this reply to the opposition of ASF Broadcasting Co. ("ASF"). ORA filed a motion to enlarge the issues against ASF on May 17, 1993. ASF filed an opposition thereto on May 27, 1993. In support of its reply to the opposition of ASF, ORA submits the following comments.

Section 73.316 Violation

The application of ASF, as amended on March 5, 1992, proposes the use of a directional antenna. Section 73.316 (c) of the Rules requires that all FM applications proposing the use of a directional antenna must include certain information or data. See also, FCC Form 301, Section V-B, page 3, Question 10. Section 73.316 (c)(1) requires a complete description of the proposed antenna system, including the manufacturer and model number of the proposed directional antenna. This sub-section specifically states that it is not sufficient to label the proposed antenna with a generic term and that a specific model number must be provided.

ASF failed to comply with this specific and unambiguous requirement. In its application, at Exhibit E-4, it referenced only a generic type of antenna. In opposition to ORA's motion to enlarge the issues as to this matter, ASF lamely claims that "typically" the Mass Media Bureau allows an applicant to supply such information with its license application. However, Section 73.316 (c)(1) requires that the model number of a directional antenna be included in the construction permit application.

Even if the Bureau "typically" ignores the requirements of Section 73.316 (c)(1), it has no legal authority to do so. The Bureau is required to faithfully follow Commission Rules and policies. See, Section 0.283 (b); RKO General, Inc. v. FCC, 670 F.2d 215, 223-224 (D.C. Cir. 1981). It can not unilaterally and arbitrarily decide which Commission Rules will be followed and which will be ignored. Moreover, it is particularly inappropriate for the Bureau to ignore the mandate of Commission Rules and policies in the context of a comparative hearing ---whose purpose is to determine whether the competing applicants are in strict

compliance with Commission Rules and policies <u>before</u> grant of the construction permit, not <u>after</u> grant!

ASF further contends that because its failure to comply with Section 73.316 (c)(1) was not mentioned in the hearing designation order it can not now be raised. However, ASF is wrong. Only if the designation order had addressed this matter, would the Presiding Judge be foreclosed from considering it in a motion to enlarge the issues. <u>Atlantic Broadcasting Co.</u>, 5 FCC2d 717, 720-721, 8 RR2d 991, 995-996, paras. 9-11 (1966), where the designation order contains no reasoned analysis of the matter in question, the Presiding Judge should make such an analysis and rule on the merits of the motion to enlarge.

ASF's failure to comply with the requirements of Section 73.316 requires the specification of a hearing issue. Sub-section (c)(1) requests information essential for the Commission staff to properly analyze and process a directional antenna application. This is critical data. The staff must know what type and model of antenna will be used in order to determine whether the applicant's proposed directional pattern will correspond with that specific antenna's predicted output and performance.

<u>Short-Spacing Issue</u>

The application of ASF indicates that its proposed tower site is 6.84 km. short-spaced, under Section 73.207, to Station WTTF-FM, Tiffin, Ohio. Under long-established Commission policy, when an applicant in a comparative hearing is short-spaced, a hearing issue must be specified as to that applicant's basic qualifications. <u>Jemez Mountain Broadcasters</u>, 7 FCC Rcd 4219, 4220, paras. 2 and 12 (1992); <u>Payne Communications, Inc.</u>, 1 FCC Rcd 1052, 1053, paras. 6, 9-10 (Rev. Bd. 1986), <u>aff'd</u>, <u>Evergreen Broadcasting Co.</u>, 6 FCC Rcd 5599, 5605, n. 3 (1991); <u>Naguabo Broadcasting Co.</u>, 6 FCC Rcd 4879, para. 5 (1991); <u>Madalina Broadcasting, Inc.</u>, 6 FCC Rcd 2508, 2509, paras. 3-5 (MMB 1991); Valley Radio, 5 FCC Rcd 4875,

cited cases will hereinafter be referred to as the "North Texas" policy or line of cases). On May 10, 1993, the Commission released On the Beach Broadcasting, FCC 93-211. Therein, at n. 1, the Commission reaffirmed that North Texas Media, Inc. v. FCC, is still binding precedent.

ASF contends that On the Beach Broadcasting and North Texas are inapplicable because the applications in those proceedings were filed before the adoption of Section 73.215. According to ASF, the adoption of Section 73.215 effectively eliminated the spacing requirements of Section 73.207. However, ASF is wrong. It fails to acknowledge that the use of Section 73.215 to employ a directional antenna is merely a standardized procedure to obtain a waiver of the spacing requirements of Section 73.207. See, MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991). The adoption of Section 73.215 only eliminated the granting of ad hoc and individualized waiver requests under Section 73.207.

Section 73.215 does not in any way eviscerate the spacing requirements of Section 73.207, or the requirement to show the unavailability of fully-spaced sites under Section 73.207. See, para. 27, supra, which states that a directional antenna at a short-spaced tower site can be used only when the unavailability of fully-spaced sites are demonstrated and only in the case of necessity. ASF can make no such showing. Section 73.215 also specifically states that a public interest showing must be made in order to obtain a grant. ASF can make no such showing.

WHEREFORE, in view of the foregoing, ORA requests that Section 73.215 and 73.316 issues be specified against ASF.

Respectfully submitted,

McNAIR & SANFORD, P.A.

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By: _____
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June 7, 1993

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 7th day of June, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of ASF" to the following:

The Honorable Walter C. Miller*
Administrative Law Judge
Federal Communications Commission
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